

No. 11437

---

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

GRIFFITHS AND SPRAGUE STEVEDORING COMPANY,  
INCORPORATED, a corporation, *Appellant,*

vs.

WATERFRONT EMPLOYERS ASSOCIATION OF THE  
PACIFIC COAST, a corporation, *Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION.

---

BRIEF OF APPELLEE

---

48

FILED

FEB - 5 1947

AUL P. O'BRIEN,  
CLERK

EDWARD G. DOBRIN,  
STANLEY B. LONG, of  
BOGLE, BOGLE & GATES,  
603 Central Building,  
Seattle 4, Washington.  
*Attorneys for Appellee.*



No. 11437

---

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

GRIFFITHS AND SPRAGUE STEVEDORING COMPANY,  
INCORPORATED, a corporation, *Appellant,*

vs.

WATERFRONT EMPLOYERS ASSOCIATION OF THE  
PACIFIC COAST, a corporation, *Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION.

---

BRIEF OF APPELLEE

---

EDWARD G. DOBRIN,  
STANLEY B. LONG, of  
BOGLE, BOGLE & GATES,  
603 Central Building,  
Seattle 4, Washington.  
*Attorneys for Appellee.*



## INDEX

	<i>Page</i>
Statement of the Case.....	1
Argument .....	13
The Tonnage Assessment is a valid Assessment Against Members of Appellee for its General Support and to Enable it to Perform its Pur- poses and Objects and is Not Contrary to Public Policy .....	13
The Tonnage Assessment is a Uniform Assess- ment Falling Equally and Alike on All Members of Appellee, Both Voting and Associate.....	33
All Members, Voting and Associate Alike, are Subject to Liability for the Tonnage Assessment Under Appellee's By-Laws.....	45
The Resolutions of Appellee's Board of Direc- tors Levying the Tonnage Assessment are not Invalid Because Not Authorized by vote of the Membership .....	52
Appellee has Levied the Tonnage Assessment Against All Members, Voting and Associate, In- cluding Appellant .....	54
The Tonnage Assessment is Not Based Upon Threatened Duress and Therefore Invalid.....	57
Appellant in Addition to Its Contractual Obli- gation Under the By-Laws, Further Agreed in Writing on March 11, 1943, to Pay the Tonnage Assessment .....	60
Conclusion .....	66

## TABLE OF CASES

<i>Alfalfa Growers of California v. Icardo</i> (Cal.) 256 Pac. 287 .....	40
<i>Anderson v. Amidon</i> , 114 Minn. 202, 130 N.W. 1002, 1004 .....	42
<i>Annandale Golf Club v. Smith</i> , 110 Cal. A. 765, 289 Pac. 806 .....	42
<i>Associated Wisconsin Contractors v. Lathers</i> , 235 Wis. 14, 291 N.W. 770, 771, 772.....	25

	<i>Page</i>
<i>Bailey v. Master Plumber Association</i> , 103 Tenn. 99, 53 S.W. 853.....	24, 33
<i>Big Creek Ditch Co. v. Hulick</i> , 130 Ore. 401, 280 Pac. 492, 494 .....	42, 43
<i>Blue Mountain Forest Ass'n. v. Borrowe</i> , 71 N.H. 69, 51 Atl. 670, 672, 673.....	41
<i>Boston Club v. Potter</i> , 212 Mass. 23, 98 N.E. 614, 615 .....	42
<i>Carmichael v. Southern Coal &amp; Coke Co.</i> , 301 U.S. 495, 522 .....	36
<i>Child v. Idaho Hwer Mines</i> , 155 Wash. 280, 284 Pac. 80, 84 .....	41
<i>Colgate v. Harvey</i> , 296 U.S. 404.....	38
<i>Constructors Association of Western Pennsylvania v. Seeds</i> , 142 Pa. Super. Ct. 59, 15 Atl. (2d) 467, 469 .....	25
<i>Electrical Contractors' Ass'n. v. A. S. Schulman El. Co.</i> , 391 Ill. 333, 63 N.E. (2d) 392, Appellate Court, 324 Ill. App. 28, 57 N.E. (2d) 220.....	19
<i>Ford v. Peninsula Light Co.</i> , 164 Wash. 599, 4 P. (2d) 504, 505, 506.....	65
<i>Gowans v. Rockport Irr. Co.</i> , 77 Utah 198, 293 Pac. 4, 7 .....	54
<i>Harris v. Northern Blue Grass Land Co.</i> , 185 Fed. 192, 194 (C.C. Wis.).....	42
<i>Hegness v. Chilberg</i> , 224 Fed. 28 (C.C.A. 9).....	32
<i>Hyer v. Richmond Traction Co.</i> , 168 U.S. 471, 480	32
<i>Illinois Central R. Co. v. Minnesota</i> , 309 U.S. 157, 163 .....	37
<i>Irons Investment Co. v. Richards</i> , 184 Wash. 118, 50 P. (2d) 42, 44.....	62
<i>Jackson v. Sullivan</i> , 276 Ky. 666, 124 S.W. 1019, 121 A.L.R. 341, 343.....	28
<i>Kellogg v. Larkin</i> , 3 Pin., Wis., 123, 56 Am. Dec. 164 .....	20
<i>Kentucky Association of Highway Contractors v. J. C. Williams</i> , 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544 .....	24, 27

# TABLE OF CASES

v

## Page

<i>Master Builders Association of Kansas v. Carson</i> , 132 Kan. 606, 296 Pac. 693.....	25
<i>Oliver Iron Mining Co. v. Lord</i> , 262 U.S. 172, 179, 180 .....	37
<i>Omaha Law Library Ass'n. v. Connell</i> , 55 Neb. 396, 75 N.W. 837.....	41, 51
<i>Opitz v. Hayden</i> , 17 Wn.(2d) 347, 135 P.(2d) 819, 827 .....	62
<i>Rogers v. Boston Club</i> , 205 Mass. 261, 91 N.E. 321, 323 .....	41
<i>Swanger v. Porter</i> , 87 Neb. 764, 128 N.W. 516, 519 .....	41
<i>Wilder v. Nolte</i> , 195 Wash. 1, 79 P.(2d) 682, 687	15

## STATUTES

California Civil Code, Sec. 598 (10) .....	34
Executive Order 9001, Title 50 U.S.C.A. App., p. 242 .....	31
Title I, Sec. 1.....	31
Title I, Sec. 4.....	31
First War Powers Act, 1941, Title 50 U.S.C.A. App., §611 .....	31
Title 50 U.S.C.A. App., §1191(a) (4).....	32

## TEXTBOOKS

17 A.L.R. 1229, 1366.....	62
45 A.L.R. 549, 551.....	28
161 A.L.R. 795, 800.....	30
6A Cal. Jur. §542.....	42
Restatement of the Law, Contracts, Vol. II, Sec. 517 .....	24
Comment a .....	24
Comment c .....	30
Illustration 6 .....	24
Williston on Contracts, Rev. Ed., Vol. 5, Sec. 1663, p. 4692 .....	24



IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

GRIFFITHS AND SPRAGUE STEVEDORING  
COMPANY, INCORPORATED, a corpora-  
tion,

*Appellant,*

vs.

WATERFRONT EMPLOYERS ASSOCIATION  
OF THE PACIFIC COAST, a corporation,

*Appellee.*

No. 11437

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION.

---

**BRIEF OF APPELLEE**

---

**STATEMENT OF THE CASE**

The following additional statement is deemed necessary for a presentation of the questions involved:

Those eligible for membership in appellee are: those regularly engaged in the business of carrying cargo by water to or from any port on the Pacific Coast of the United States (except Alaska ports) and there are 84 such members designated as voting members; and those employing longshoremen or other shore employees in any of said ports, including stevedores and terminal operators, and any association of employers of such longshoremen or other shore em-

ployees or formed to deal with matters relating to such employments and there are 47 such members, including appellant, designated as associate members (Ex. 1, Art. V, R. 55; Finding 4, R. 37). All or substantially all eligible employers are members of appellee and of one or more of the hereinafter mentioned Port Associations (R. 516, 517).

Appellant since prior to the organization of appellee has been engaged as a stevedore in the performance of ship, dock and other shore work at ports in the State of Washington, employing longshoremen and other shore employees for that purpose, and since becoming an associate member of appellee in July, 1937, has at all times hired its longshore and other shore employees in accordance with and under labor agreements negotiated and administered by appellee (Finding 5, R. 37).

Appellee's corporate powers are vested in a Board of Directors with two members designated by each of the Port Associations as ex-officio members, and its officers are a President, one or more Vice Presidents, a Secretary and Treasurer (Ex. 1, Art. I, II, III, R. 57).

Appellee's principal purposes and objects are the representation of its members in matters relating to the employment of longshoremen and other shore employees, including the negotiation, execution and performance of contracts with groups or associations of longshoremen and other shore employees governing wages, hours and working conditions of such employment, and the development, establishment and mainte-

nance of safe working conditions and rules relating thereto (Ex. 1, Art. II, R. 51, 52, 56). Appellee enables its members to deal collectively with employees collectively, so as to work out labor agreements which give stability and minimum standards in the industry, whose labor pool is used interchangeably (R. 316, 354). The functions of appellee are in the labor field and it performs no functions for its members other than as related to this subject (R. 311, 335). It does not participate in the business policies of its members or in their dealings with those for whom they perform their services, except as related to its labor functions (R. 341).

Appellee at all times since its organization has been performing its purposes and objects on behalf of its members, including appellant (R. 300), and appellant at all times since becoming a member has fully participated in and fully enjoyed the benefits of membership (Finding 6, R. 38; Finding 17, R. 41).

Prior to the organization of appellee, so-called "Port Associations" at the four principal ports on the Pacific Coast, to-wit, Seattle, Portland, San Francisco and Los Angeles, were organized, having similar membership eligibility and similar purposes and objects, but limited in their respective functioning to each of said four principal ports and other ports in the general district adjacent thereto, which in the functioning of appellee are known respectively as the Washington, Oregon and California districts (R. 305, 306). Among the Port Associations is the Water-front Employers of Washington, herein called the

"Washington Association," a non-profit corporation of the State of Washington (Ex. 2, R. 78, 258).

As a result of the award in 1934 of the National Longshoremen's Board appointed by the President of the United States, a uniform coastwide longshore agreement for all ports on the Pacific Coast was established, which award as amended by subsequent negotiations between appellee and the Union representing longshoremen, remains in effect (Ex. 34, R. 307, 312, 313). This award made it necessary for the Port Associations to form an association on a coastwide basis resulting in the organization of appellee (R. 307-309). The then President of appellant, Joseph Weber, who was then a trustee of the Washington Association and had previously been its President (R. 408) was active in the organization of appellee (R. 309-311). He became an ex-officio member of the Board of Directors and continued as such until his retirement in 1941, and regularly attended its meetings which are held quarterly, one of which meetings is the annual meeting held in conjunction with the annual meeting of the membership (R. 310, 311, 410, 461, 462).

The Port Associations have continued their existence and became and have remained associate members of appellee (R. 311), the Port Associations at San Francisco and Los Angeles having subsequently consolidated into one Port Association for the State of California (R. 306, 371). The Port Associations have delegated authority to appellee in all matters pertaining to both coastwide and port labor relations for the

purpose of having a uniform policy on all labor matters on a coastwide basis (R. 311, 313, 314, 317).

Each of the Port Associations performs on behalf of its members requesting such service in connection with payrolls the functions of collective reporting and central pay office, financed by a payroll tax against the employers using the service. Collective reporting by a Port Association consists of making a collective report on behalf of its members using the service to the appropriate State and Federal agencies as required, pertaining to income tax withholding and social security contributions and deductions from payrolls. The central pay office consists of the operation of a central pay office where the individual employers deposit their payrolls and where the same are disbursed to the employees (R. 330, 336-339, 420; Ex. 3A, R. 95). Appellant has been a member of the Washington Association since its organization (R. 259) and has at all times availed itself of the collective reporting and central pay office services of the Washington Association. F. E. Settersten, President of appellant (R. 301), is a trustee of the Washington Association, and a member of its Finance Committee (R. 411).

The primary, but by no means the only important, labor function of appellee is the negotiation and administration of the coastwide longshore agreement (R. 321, 322; Ex. 34, R. 141). The longshoremen in each port employed under that agreement work interchangeably for the several employers in each port (R. 354) and the agreement provides for the hiring of

all longshoremen through hiring halls maintained and operated jointly by and at the equal expense of the Union and appellee (R. 325; Ex. 34, Sec. 4, R. 150). There are 15 such hiring halls, of which one is at Seattle and 5 in the other ports in the Washington district (R. 324, 325, 393). In order to administer the terms of said agreement and the dispatching of longshoremen from the hiring halls there has been established under the agreement a Port Labor Relations Committee in each port, consisting of three representatives of appellee and three representatives of the Union (Ex. 34, Sec. 9, R. 152, 393). M. J. Weber, the Vice President of appellant, has been the representative of appellee on the Port Labor Relations Committee for the Port of Seattle for the past three years (R. 413). A Port Labor Relations Committee in administering the affairs of a hiring hall maintains and operates the same and has complete control of the registration of all longshoremen and the decision of all questions regarding rotation of employment and the determination of the organization of gangs and methods of dispatching and the allocation of men among employers where the demand for men exceeds the available supply (R. 333, 351, 352). In the matter of allocation the Port Labor Relations Committee for the Port of Seattle maintains an Advisory Committee on Allocation and said M. J. Weber served on that committee in 1942 (R. 412).

It is the duty of the Port Labor Relations Committee to determine any question involving the interpretation of the longshore agreement and to decide any

dispute arising thereunder. There has likewise been established under said agreement a Coast Labor Relations Committee consisting of three representatives of appellee and three representatives of the Union. The Coast Labor Relations Committee has the power to set aside any decision or other action of any Port Labor Relations Committee and has the power and duty to establish uniform coast working and dispatching rules and to interpret and apply the same. Disagreements which are not settled by the Coast Labor Relations Committee are to be settled by the Coast Arbitrator, provided for in said agreement, and in the process of determining disputes under said agreement there have been some 200 hearings and awards of arbitrators (R. 326, 327, 393, 394; Ex. 34, Sec. 9, R. 152).

In addition to the negotiation and administration of the coastwide longshore agreement, appellee determines the policy, with power of final decision, on all local or so-called port labor agreements (R. 313, 317, 318), of which there are approximately 34 in number (R. 311), covering various classifications of waterfront labor (Ex. 35; R. 315). The men working on the waterfront in the various classifications under said agreements are likewise used interchangeably by the several employers (R. 314, 354).

Commencing with the war emergency, in addition to the administration of the longshore agreement by the parties through the Port Labor Relations Committees, the Coast Labor Relations Committee and the Coast Arbitrator, the War Shipping Administration

created the Pacific Coast Maritime Industry Board, a tri-partite Board consisting of two public members, two union members and two members representing appellee, which Board met on an average of once a week and had for its purpose the increasing of efficiency in cargo handling on the Pacific Coast in the interests of the procurement agencies of the Government engaged in the operations of vessels, to-wit: the War Shipping Administration, the War Department, hereinafter referred to as the "Army," and the Department of the Navy, hereinafter referred to as the "Navy" (R. 327, 328, 331, 332). Some 30 cases relating to labor problems in the industry were processed before this Board in formal hearings and much of the statistical data required by this Board was supplied by appellee (R. 328, 333). Representatives of these procurement agencies attend meetings of the Labor Relations Committee, Board of Directors and membership of appellee as they are vitally interested in being informed concerning the labor problems discussed and desire to cooperate and at times to make proposals (R. 311, 356, 357). These procurement agencies rely upon appellee for help in the labor field, including the obtaining of data on accident prevention and information as to labor agreements, conditions and practices (Finding 8, R. 38, 349). Appellee is relied upon to keep these procurement agencies informed on labor disputes and the remedies therefor and to lead the way in the prevention of pilferage (R. 335). In connection with contracts of its members, appellee provides these procurement agencies with copies of the various labor agreements and gives

notice of impending or actual labor disputes and impending changes in agreements which may result in additional expense (R. 356).

Since its organization appellee has maintained an Accident Prevention Bureau, having the functions its name implies (R. 339, 340), and headed by a Chief Safety Engineer and his assistant, with a staff of resident engineers in each of the four principal ports, three of whom are located in the Port of Seattle, together with an office staff in each of the four principal ports (R. 340). The budget for this activity for the year 1944 was \$80,000.00 and for the year 1945 was \$100,000.00 (R. 340, 407). In each port local committees of members of appellee, known as the Accident Prevention Committee, are formed to assist in the work of the Bureau (R. 340). The Bureau performs all services to indicate what is safe and what is unsafe equipment and how to make unsafe equipment safe (R. 347). When an issue of safety arises on the job the resident engineer is called and makes an inspection and requests that the necessary correction be made by the employer (R. 344). The Bureau carries on an educational program among the employees in safety matters and furnishes consulting services to employers and to the government agencies interested in accident prevention and the procurement agencies have extensively utilized these services (R. 347-349). The Bureau has established a code of safe practices (R. 348). Before the organization of appellee such safety work was being carried on and Joseph Weber, the then President of appellant, on the organization of appellee, assisted in the organization of the Bureau

and was a member of the Accident Prevention Committee of the Port of Seattle from the beginning, being succeeded by F. E. Settersten, the present President of appellant, in 1940 (R. 408, 409, 411). In 1939, M. J. Weber, the Vice President of appellant, likewise became a member of the Accident Prevention Committee for the Port of Seattle and remains a member, having been Chairman of an important subcommittee in 1941 and Chairman of the Accident Prevention Committee in 1944 (R. 411, 412). Accident prevention is a vital phase of labor relations and the activities of the Bureau have been a significant factor in reducing accidents and thereby the cost of compensation insurance (R. 340, 342). The average cost of off shore compensation insurance for members of appellee is 8.6% of the payroll as against 15% of the payroll of employers on the East Coast of the United States where similar accident prevention work is not being carried on (R. 340, 407).

In addition to its officers with headquarters in San Francisco, appellee there maintains the following staff, to-wit: a research man, two statisticians, legal counsel and clerical and office personnel; also port offices and staffs at each of the four principal ports, consisting of a port manager and assistants, legal counsel and clerical and office personnel with an assistant port manager at the Port of Tacoma (R. 328-330, 357, 359). The port manager acts as one of the three members representing appellee on the Port Labor Relations Committee in each of the four principal ports and supervises the work of the Port Labor Relations Committee at such ports and the work of the

Port Labor Relations Committees in the other ports in his district, as well as all committees of appellee in the district (R. 349, 350). The staff of appellee in administering labor agreements secures observance of the same, directs the handling of all disputes which arise and prepares all necessary factual material and presents the same before the Port Labor Relations Committees, the Coast Labor Relations Committee and the Coast Arbitrator (R. 329, 350). The administration of the longshore agreement involves all the labor problems incident to an industry covering normally 15,000 men in 24 ports (R. 323, 324). The staff of appellee also supervises the work of the Port Labor Relations Committees in the supervision of the hiring halls. The staff of the hiring hall in the Port of Seattle consists of a chief dispatcher, three assistants, a clerk and two janitors (R. 351).

Appellee studies all legislative measures directly affecting its members, reporting thereon to its members and taking such action as may be indicated (R. 355). Appellee acts for its members in connection with questions involving the application of the Fair Labor Standards Act to the industry and likewise handles for its members labor problems within the jurisdiction of the National Labor Relations Board and of the National War Labor Board (R. 334, 405, 406).

Reports on all of its activities are given to the Board of Directors at its meetings and the members of the Board of Directors in turn make reports to the membership in the various districts following each quarterly meeting (R. 476, 477). Action taken by

the Board of Directors or by the membership on special subjects is reported in writing to all members (R. 518-521). The President of appellee attends meetings of the Port Associations and makes reports on the activities of appellee (R. 477). Appellee operates on a budget and monthly financial statements are submitted to the Board of Directors and an annual financial statement is submitted to the annual membership meeting (R. 519, 520). The records of appellee are open for inspection by the members (R. 521).

On the organization of appellee the method of financing its activities was thoroughly and fully discussed and Joseph Weber, the then President of appellant, was active in these discussions (R. 362, 363), which finally resulted in the unanimous adoption (R. 364) of the by-law provision giving to the Board of Directors the power:

“To levy and assess and collect, and provide for the collection of, dues or assessments in accordance with the provisions of these by-laws \* \* \*.” (Art. IV(f), R. 59)

and the by-law provision that:

“In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports) \* \* \*.” (Art. XVI, R. 72)

The amount to be so paid by each member is referred to as the “tonnage assessment.” Inasmuch as the by-laws specify the method of assessment there remains only for the Board of Directors in levying the

assessment to determine the amount to be paid by each member per ton of cargo.

By resolution of July 31, 1937 (Ex. 3A, R. 95, 529, 530) the Board of Directors levied the tonnage assessment and fixed the rate. This action was ratified by all members (Ex. 7, R. 99, 549, 550). The rate was increased to the present level by resolution of May 11, 1938 (Ex. 5, R. 97) and confirmed by subsequent resolutions (Ex. 7, R. 99; Ex. 17, R. 115), all of which are admitted by appellant to have been duly adopted (R. 260, 266, 267, 279).

The tonnage assessment method was adopted in part as the result of the previous experience of the Port Associations indicating the necessity for such a simple uniform assessment (R. 363, 364). It affects all members who load or discharge cargo alike and falls equally on all members. The failure of appellant to pay the full tonnage assessment owing by it for the years 1943 and 1944 resulted in this action.

Additional statement as necessary will be made in connection with the argument on each of the specification of errors argued by appellant.

### ARGUMENT

**The Tonnage Assessment Is a Valid Assessment Against Members of Appellee for Its General Support and to Enable It To Perform Its Purposes and Objects and Is Not Contrary to Public Policy.**

By its specification of errors appellant asserts that the trial court erred in failing to conclude as a matter of law that appellee's claim is contrary to public pol-

icy and therefore void and unenforceable (Br. 6, 7). This appellant asserts is its "primary defense" (R. 254).

Appellant does not urge that the purposes and objects of appellee are contrary to public policy or that it would be unlawful for it to obtain funds for its support from its members. The argument is limited to the proposition that the "specific dues program," namely, the tonnage assessment, is a method which cannot be lawfully employed insofar as the amount per ton is measured by the tonnage of cargo loaded or discharged by appellant for the Army. It is said that by such application of the tonnage assessment appellee inevitably seeks to finance its operations by adding to the costs of "public contracts" made by its members and that this is contrary to public policy, thus making the tonnage assessment illegal and void (Br. 8). It is not contended that such result follows where "public contracts" are not involved. The claimed illegality is therefore precisely limited.

In considering appellant's argument on this issue it must be assumed that but for the claimed violation of public policy there is liability for the tonnage assessment. Other alleged defenses to liability intermingled by appellant in its discussion will be dealt with in connection with the specific argument on such issues.

The trial court found:

"In order for the defendant to have handled the loading of cargo upon and discharging from vessels for the Army it needed the services performed by plaintiff and if it had not secured such

services from plaintiff the defendant would have needed to have furnished them itself at a much greater cost to defendant than the assessments levied and charged by plaintiff." (Finding 15, R. 40)

"The said tonnage assessment is \* \* \* a just and equitable amount to be paid by the members of the plaintiff to provide for the general support of the plaintiff and is commensurate with the value of the services performed by the plaintiff which its members, including the defendant, have enjoyed and needed." (Finding 17, R. 41)

Inasmuch as neither of these findings are challenged by appellant, it may be seen at the outset that the tonnage assessment owing by appellant merely amounts to just reimbursement to appellee for needed services rendered to and enjoyed by appellant.

Appellant having had more than value received for the amount here sought to be recovered and seeking to escape liability upon alleged grounds of public policy must, of course, sustain the burden of proving the alleged illegality. Such a defense under the circumstances here presented is clearly a "very dishonest one" and "is only allowed for public considerations, and in order the better to secure the public against dishonest transactions." *Wilder v. Nolte*, 195 Wash. 1, 79 P.(2d) 682, 687. No such public considerations are here present in aid of appellant's defense. Appellant hopes by this defense to be relieved of a legitimate obligation (R. 601).

The tonnage assessment is levied against members loading or discharging cargo and is measured by the

number of tons so loaded or discharged (R. 377, 430, 436). The liability for the tonnage assessment rests on the member who loads or discharges the cargo (R. 378). It is, of course, clear that the tonnage assessment is levied on and is payable only by members. This is not an action against the Army to recover a tonnage assessment levied against it. This action is against appellant to recover the tonnage assessment which it owes.

It is further clear that any member of appellee may elect to absorb any business expense, including the tonnage assessment, in its profits if it desires to do so. Like all business expenses, if the member does not recover the tonnage assessment from the person for whom the cargo was loaded or discharged, either as a special charge or otherwise, that is a matter wholly between the member and the person for whom the services are being performed.

There is no provision in appellee's by-laws requiring that any member shall collect the tonnage assessment from the person for whom cargo is loaded or discharged. It is true that the stevedore members initiated an agreement (Ex. 10, R. 105) subsequently signed by them, whereby they obligated themselves to collect the tonnage assessment from non-member steamship companies and that this agreement was approved by the Board of Directors (R. 378, 379, 507, 508; Ex. 8, R. 100; Ex. 9, R. 101). Appellant asserts that this agreement was not intended to include the procurement agencies, including the Army (Br. 15). This agreement will be further discussed on another issue (*infra* p. 48).

The trial court found:

“Commencing with the war emergency, in addition to many other activities, the plaintiff supplied much statistical data and assistance to the Pacific Coast Maritime Industry Board, the War Shipping Administration, the Army and the Navy in connection with labor matters, including accident prevention, and the government agencies and departments above-mentioned have made extensive use thereof.” (Finding 8, R. 38)

“\* \* \*. As the preparations for war increased and on the advent of the war the cargoes loaded and discharged for the government increased until substantially all cargoes were being transported by agencies of the government, including in addition to the Army and the Navy, the War Shipping Administration, which latter agency took over substantially all private shipping operations.” (Finding 10, R. 39)

“The government agencies, the War Shipping Administration, the Army and the Navy have recognized the tonnage assessment to be a legitimate business expense of the member paying for the same and have allowed the tonnage assessment as a part of the overhead expense.” (Finding 16, R. 41)

Appellant questions only the last finding, although no error is specified thereon and it is amply supported by the testimony (R. 414).

In appellant's contract with the War Shipping Administration (Ex. 40), being a so-called cost-plus-a-fixed-fee contract with the fixed fee covering supervision, it is expressly provided that “contributions or payments made by the Stevedore for the maintenance

of hiring halls," referring to the tonnage assessment, are a "part of the Stevedore's general supervisory and administrative expense" (Part II, 1(b), R. 390).

It is clear that the procurement agencies, including the Army, have recognized the tonnage assessment for what it is, namely, a legitimate overhead expense for services needed by members in performing their contracts with the procurement agencies and others.

It is not disputed that from the organization of appellee its members have loaded and discharged cargo for various agencies of the government, including the Army, and have paid the tonnage assessment thereon. Appellant commenced to load and discharge cargo for the Army in 1940, but has not paid the tonnage assessment for the period subsequent to 1942 (Finding 10, R. 38, 39; Finding 19, R. 42), although it has continued the payment of the tonnage assessment on cargo loaded or discharged for the War Shipping Administration (Finding 14, R. 40).

Appellant asserts that the tonnage assessment is a plan to lay a toll upon every ton of cargo entering or leaving any Pacific Coast port, payable by every shipper, member, non-member or governmental agency as a condition to using the ports of the West Coast of the United States (Br. 30). This is a wholly inaccurate statement. The tonnage assessment is not a tax on the cargo and appellee claims no lien against the cargo or rights against the owner or bailee thereof. It claims only that its members are obligated under its by-laws to pay the tonnage assessment. If a non-member of appellee loads or discharges cargo, appellee claims no

right against either the cargo or anyone else to collect the tonnage assessment or any other form of assessment for loading or discharging cargo. Appellee does claim the right to collect a so-called man-hour charge from all non-members who secure longshoremen from the joint hiring halls for any purpose. The expense of these hiring halls is borne equally by appellee and the Union and this man-hour charge is for the purpose of a reasonably equitable reimbursement to appellee of the allocable costs to it of maintaining the hiring halls and for no other purposes (R. 360, 361). This man-hour charge is not involved in this action.

This brings us to a discussion of the authorities cited by appellant in support of its assertion that the tonnage assessment measured by the tonnage of cargo loaded or discharged for the Army is contrary to public policy and therefore illegal and void as adding to the costs of public contracts.

Reference will first be made to the case of *Electrical Contractors' Ass'n. v. A. S. Schulman El. Co.*, 391 Ill. 333, 63 N.E.(2d) 392, Appellate Court, 324 Ill. App. 28, 57 N.E.(2d) 220, relied upon in part by the trial court (R. 34) and which it is submitted fully supports the position of appellee. In that case the association members consisted of electrical contractor-dealers and dealers, the latter having no vote on matters concerning construction or labor working agreements. Under the by-laws membership dues were measured by a percentage of the business done by each. The association on behalf of its members was a party to a labor agreement administered by and at the expense of the association and performed various other services for its

members. In resisting payment of dues a dealer member contended that dues measured by a percentage of business done was against public policy as tending to stifle competition and to destroy competitive bidding. The court stated:

“The sole question in this case is as to the validity of the agreement as evidenced by the constitution and by-laws of the association. It is not a case where we need go beyond the instrument to determine the interpretation the parties placed upon it, but evidence was introduced to show the consideration each member received for the dues paid.” (p. 396)

The court, after quoting from Department of Commerce reports showing the large number of trade associations which collect dues on a sliding scale in proportion to the size or volume of business and which function in a similar manner and stating that “these activities are working in the public interest” (p. 397), concluded that the provision for dues was not contrary to public policy. The cases relied upon by appellant were relied upon unsuccessfully by the defendant in this case.

On the contention that the dues tend to stifle competition the court said:

“\* \* \* courts are not privileged to ascribe illegal purposes where there is nothing in the contract from which such a conclusion may be reasonably drawn. In *Kellogg v. Larkin*, 3 Pin., Wis., 123, 56 Am. Dec. 164, it was said: ‘Before a court should determine a contract which has been made in good faith stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of

the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.'

"\* \* \* .

"\* \* \* . Can it be said that an agreement between contractors to pay dues to their association fixed at a percentage of the business done is an agreement which, without more, has the effect of stifling competition in bidding, whereas, if the same contractors paid their association dues at a flat rate and without regard to the amount of business done, it would not interfere with competitive bidding? We do not find that the basis of payment of dues has any just distinction. It must be conceded that either method may interfere with competitive bidding, but it is a matter which arises from other circumstances in connection with the making of the contract and does not rest solely upon the method by which the dues each member is to pay the association are computed. There is nothing in the mere form of payment of dues on a percentage basis that supports an inference that it has something sinister about it." (p. 395)

As to the contention that the dues tend to stifle competitive bidding, the court said:

"\* \* \* . To adopt such a conclusion is to assume that dues paid will, in the course of time, be distributed to the members in the form of dividends. There is nothing in the constitution or by-laws to support it. It is a non-profit corporation and the accumulation of money or the division of it in form of dividends to the members is not provided. The objects of the association \* \* \* contain no reference to contractors' interest in the earnings

of the association. The objects \* \* \* clearly and definitely contain nothing that could be interpreted as a scheme among the members to control bidding or to stifle competition. Purpose number 4 calls for co-operative action among the members in all things bearing on the well-being of the industry. Such purpose is broad, but to say that it contains a design to stifle competition is to go beyond its plain terms and ascribe ulterior motives to the members of the association where there is no basis for it." (pp. 395, 396)

A further contention of the defendant that the dues would be added to the cost of the job was dealt with in the decision of the appellate court, as follows:

"One of the objections raised to the payment of dues proportionate to the volume of business done is that the percentage charged by the Association would be added to the cost. We cannot see that this is true or that such action would so result. The benefits that the members receive from the Association necessarily bring about a reduction in the bid, whereas if they had not received the benefits from the Association the bid would necessarily be higher. And we, therefore, cannot follow the reasoning that dues fixed on a basis proportionate to the volume of business done would be added to the cost of a job any more than if the dues were fixed on a flat rate. In each case, whether flat or proportionate, the dues would be administration expense and should be so considered. If flat rate dues are legal and appropriate, we see no reason why dues proportionate to the volume of business done by a member should be condemned.

"There is in proportionate dues no stifling of competition, no agreement that might injuriously

affect the public, and no restraint of trade; they only provide a method of determining a just and equitable amount to be paid by the member to the trade association for services actually rendered by the Association and actually received by the member. The member knows the basis of the dues when he joins the Association, and he is under no compulsion to join, but when he has joined and received the benefits and advantages of the Association, he cannot successfully claim that his contract to pay dues proportionate to the volume of business done by him is invalid and void unless it can be shown that such method of fixing dues is expressly contrary to the public policy of this State." (pp. 225, 226)

The supreme court on this subject said:

"\* \* \*. It is our view that unless there is proof that such percentage was added to the contract price, there is nothing that condemns it as being against public policy any more than if the contractor had paid a like amount as a flat rate fixed without regard to the amount of business transacted. We apprehend that any dues which a member is required to pay at a flat rate would be carried as an overhead charge and would be reflected in the bids made, the same as any other overhead item." (p. 396)

No proof was offered that the tonnage assessment was added to appellant's Army contracts.

Appellant in attempting to distinguish this case asserts that it apparently did not involve a situation in which the members of the association were paying as dues a percentage of public contracts (Br. 27). It clearly appears that two of the contracts involved were public contracts (appellate court, p. 222).

With the exception of *Kentucky Association of Highway Contractors v. J. C. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544, and *Bailey v. Master Plumber Association*, 103 Tenn. 99, 53 S.W. 853, the remaining cases relied upon by appellant are applications of the rule announced in *Williston on Contracts*, Rev. Ed. Vol. 5, Sec. 1663, p. 4692, and held inapplicable in the *Electrical Contractors* case (Ill.):

“Bargains directly tending to chill competition, such as one that the successful bidder shall pay a percentage to his competitors, \* \* \* constitute illegal stifling of competition. Competition may also be stifled by a bargain so to bid as to affect injuriously the final result of the competition though the number of bidders is not lessened.”

This same rule is likewise announced in *Restatement of the Law, Contracts*, Vol. II, Sec. 517, as follows:

“A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.”

In *Comment a* to the rule, it is stated:

“The common case of the application of the rule stated in the Section is in bargains not to bid at auction sales or at other competitive sales. Competition may also be stifled, however, by an agreement so to bid as to affect injuriously the final result of the competition even though the number of bidders is not diminished (see *Illustration 6*).”

*Illustration 6* reads:

“A, B, C and D, building contractors, agree with one another to form the X association and that in future bids for the award of building

contracts the successful bidder shall pay the X association 2 per cent of the gross amount of the price fixed in the contract awarded. The agreement between A, B, C and D is illegal."

In *Master Builders Association of Kansas v. Carson*, 132 Kan. 606, 296 Pac. 693, a typical example of *Illustration 6* was presented. The court held invalid a by-law of the association whose members were contractors, providing that the successful bidder should pay a percentage of the contract price of all work done, of which the association was to distribute one-half among unsuccessful bidders on the same contract.

In *Constructors Association of Western Pennsylvania v. Seeds*, 142 Pa. Super. Ct. 59, 15 Atl.(2d) 467, 469, it does not appear whether the association was one for non-profit, but the case is a further example of *Illustration 6*. The court held invalid a by-law of the association whose members were contractors providing for the payment to the association of a percentage of the contract price of all work done, stating:

"\* \* \*. The percentage charged all members is obviously not a payment in the form of dues for services rendered by the association, but gives to such members an interest in the contract as it results in making a distribution to them through the association of a portion of the contract price. If the percentage were larger the effect thereof would become more evident. The principle, however, is the same. The natural tendency of the by-law to prevent and stifle competition, therefore, brings it within the classification set forth in section 517 of the Restatement \* \* \*."

In *Associated Wisconsin Contractors v. Lathers*,

235 Wis. 14, 291 N.W. 770, 771, 772, a further example of *Illustration 6* is presented. The court held invalid a by-law of the association whose members were contractors providing for payment to the association of a percentage of the contract price of all work done. The court cited Restatement of the Law, Contracts, Sec. 517, and Williston on Contracts, Sec. 1663, *supra*, and stated:

“\* \* \*. An agreement limited to having a common treasury into which a certain percentage of the revenue from public contracts is to be paid falls under condemnation of the rule protecting the freedom and integrity of competition in securing contracts for public work. \* \* \*.

“\* \* \*. The public policy which insists upon competition between bidders for public work and dictates that contracts shall be let to the lowest responsible bidder is violated when prospective bidders enter into an arrangement to exact from each other a percentage ‘of the amount of each contract secured’ \* \* \*.

“\* \* \*.

“\* \* \*. We consider the complaint as showing the respondent is exacting dues from its members measured by the amount of contracts for highway construction obtained by a member without corresponding benefit to the public, and as containing no allegation of facts that take the case out from under the rule.”

In reference to this case the appellate court in the *Electrical Contractors* case (Ill.) states:

“If the above decision is based, as we presume it is, on the fact that there was no allegation or proof that the Association had rendered services

to the bidder commensurate with the percentage charged, then we agree with it. We cannot presume that a trade association would arbitrarily fix its dues on the basis of volume of business done and not render services for the dues charged. But if the above decision is based on the broad principle that a trade association cannot be paid according to the value of the services rendered to its members, then we disagree with it. If it had been proved that members in that case had been enabled, through the services and cooperation of the Association, to bid a lower amount than they would otherwise, and were enabled, through the services and cooperation of the Association, to furnish skilled labor and avoid labor disputes and other difficulties, then the Wisconsin court would doubtless have taken a different view of the question presented." (p. 226)

and the supreme court states:

"\* \* \* we do not agree that any inference that the public is going to be injured arises from the mere fact that the money collected from each member was computed on the percentage of the business done." (p. 396)

In *Kentucky Association of Highway Contractors v. J. C. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544, 547, 548, the court held invalid a by-law of the association whose members were contractors, providing for the payment to the association of a percentage of the contract price of public highway work. The court apparently did not rest its decision on the rules of law governing the three previous cases referred to and relied upon by appellant, but held as a matter of public policy of the State of Kentucky that such a by-law must be condemned as having "a ten-

dency to be injurious to the public or against the public good" and this "regardless of the lawful intent of the parties in making it, and also regardless of the further fact that the public may not have been injured in the particular instance." That the decision in this case is so limited is stated in *Jackson v. Sullivan*, 276 Ky. 666, 124 S.W. 1019, 121 A.L.R. 341, 343, where it is said:

"\* \* \*. This case does not bear any great weight on the question of unreasonable restraint of trade or restriction of competition, but is applicable as illustrating the attitude of this court towards agreements and combinations having a tendency to be hurtful to the public interest."

Appellant cites no decision so announcing the public policy of either Washington or California.

In the annotation to this case in 45 A.L.R. 549, it is stated:

"The rule in the United States is settled that an agreement between contractors bidding for public work, which tends to suppress or stifle competition, is against public policy and void." (p. 549)

The qualification to this rule is stated:

"The co-operation of public contractors to accomplish an object which neither could gain if acting in his individual capacity is not within the rule, though it may prevent the rivalry of the parties, and thus lessen competition." (p. 551)

Appellant asserts that the statement of purposes of the Kentucky association are fully as laudable as those of appellee (Br. 18). With this appellee cannot

agree. The purpose of the Kentucky association, as shown by its articles, was solely to assist the members in connection with matters pertaining to the obtaining and performance of public contracts on a basis "tending to raise the standing of contractors in the business world" (p. 545). Whatever such general language may mean, it is clear that it has to do with matters pertaining to the business relations between the members of the association and those for whom they worked. This is not true as to appellee, whose functions are in the labor field. It performs no functions for its members other than as related to this subject and does not participate in the business policies of its members or in their dealings with those for whom they perform their services, except as related to these labor functions (R. 335, 341).

In commenting on this case the appellate court, in the *Electrical Contractors* case (Ill.) stated:

"The above case appears to hold that it is immaterial whether the plaintiff Association rendered a service to its members commensurate with the dues charged. We have held that the plaintiff Association did render services to its members commensurate with the dues it charged, and we are not in accord with the finding announced in the above Kentucky case. Under the holding of that court, any expense which was figured by the bidder as administration expense might be used to hold the contract void. Under that decision if flat rate dues in a trade association had been figured as a portion of the administration overhead expense, then such flat rate dues would be proportionately added to the bid for the public work, and thus neither flat rate

nor proportionate rate would be held legal. The decision in effect condemns all overhead expense, and might be carried to the extreme of holding as excessive the salaries of officers of bidders. We disagree with the principle announced in this case and cannot subscribe to its reasoning." (p. 226)

The supreme court in affirming the decision of the appellate court refused to adopt the reasoning in the *Kentucky Association* case (Ky.) (p. 396).

In the annotation to the *Electrical Contractors* case (Ill.) in 161 A.L.R. 795, 800, the decision in the *Kentucky Association* case (Ky.) is criticized in part as follows:

"It is submitted that when a court holds, as a matter of law and without supporting evidence, that the payment of dues proportioned to business done has a tendency to raise prices, it ignores the facts. It ignores the probability that the association gives the dues-payer his money's worth, and that it can perform services which actually result in reduced prices to the public."

The rule set forth in Restatement of the Law, Contracts, Sec. 517, in *Comment c*, provides:

"The rule stated in the Section has no application where things are not offered for competitive bidding."

In the foregoing cases relied upon by appellant it is clearly indicated that the contracts involved were those resulting from competitive bids. The contracts between appellant and the Army (Exs. 37, 38, 39) were not entered into as a result of competitive bidding. These contracts were made pursuant to the

First War Powers Act, 1941, Title 50 U.S.C.A. App. §611, providing that:

“The President may authorize any department \* \* \* of the Government exercising functions in connection with the prosecution of the war effort \* \* \* to enter into contracts \* \* \* without regard to the provisions of law relating to the making \* \* \* of contracts \* \* \*.”

By Executive Order 9001, Title 50 U.S.C.A. App., p. 242, following §611, it is provided in Title I, Sec. 1, that the:

“\* \* \* War Department, the Navy Department, and the United States Maritime Commission \* \* \* are authorized \* \* \* to enter into contracts \* \* \* without regard to the provisions of law relating to the making \* \* \* of contracts.”

and by Sec. 4 that:

“Advertising, competitive bidding and bid \* \* \* need not be required.”

All of the contracts here involved, pursuant to which appellant loaded and discharged cargo for the Army show on their face that they were not made under the provisions of statutes requiring competitive bidding, but were negotiated contracts under authority of the First War Powers Act, 1941, and Executive Order 9001. Exhibit 37, covering the period September 1, 1942, to June 30, 1943, and Exhibit 38, covering the period July 1, 1943, to June 30, 1944, each on its face states that it is a “negotiated contract.” Both of these contracts were thereafter amended from time to time and it is clear that neither the contracts nor the amendments were made as a result of competitive bidding. Exhibit 39, covering the period July

1, 1944, to June 30, 1945, was the final evolution of the form of contract under the First War Powers Act, 1941, and Executive Order 9001, and abandons all irrelevant reference to bids, offers and acceptances and states on its face:

“This contract is authorized by the First War Powers Act, 1941, and Executive Order 9001, dated December 27, 1941.”

This contract was likewise amended from time to time and it is clear that neither the contract nor the amendments were made as the result of competitive bidding.

These contracts are all subject to renegotiation for the purpose of recapture by the government of excessive profits (Title 50 U.S.C.A. App., §1191(a)(4)). It is apparent that under negotiated contracts wherein the government has the right of renegotiation, the basis for the rule which appellant urges no longer exists. Irrespective of the contract price contractors are not permitted to retain excessive profits.

Every case must be determined upon its peculiar facts and circumstances, and the courts, before condemning an agreement “must see that the agreement is such as really destroys the value of competitive bidding \* \* \*.” *Hyer v. Richmond Traction Co.*, 168 U.S. 471, 480; *Hegness v. Chilberg*, 224 Fed. 28 (C. C.A. 9).

It is affirmatively shown that the services of appellee enabled appellant to perform its contracts with the Army at a less cost than if the services had not been performed (Finding 15, R. 40). The tonnage

assessment, therefore, rather than having an "evil tendency" to injure the public has on the contrary an actual beneficial result in reducing or tending to reduce the costs to the public. The tonnage assessment does not result or tend to result in an addition to contract prices, but results or tends to result in a reduction.

In *Bailey v. Master Plumber Association*, 103 Tenn. 99, 53 S.W. 853, the last case cited by appellant and not further discussed in its brief, an association of plumbers which required its members to report all business done in competition with other members and to pay the association an agreed amount for each article sold, was held to be an organization in restraint of trade. This case involves principles of law entirely foreign to the issue here.

**The Tonnage Assessment Is a Uniform Assessment Falling Equally and Alike on All Members of Appellee, Both Voting and Associate.**

Appellant specifies as error the finding of the trial court that:

"The said tonnage assessment is a uniform assessment falling equally and alike on all members of the plaintiff, both voting and associate, who load or discharge cargo upon or from vessels on the Pacific Coast \* \* \*." (Finding 17, R. 41)

and specifies as error the failure of the trial court to find to the contrary and to conclude therefrom that appellee's claim is unenforceable (Br. 6, 30). These contentions are made in the face of the trial court's findings, which are not here attacked, that the ton-

nage assessment is commensurate with the value of the services performed and if it had not secured such services from appellee the appellant would have needed to have furnished them itself at a much greater cost (Finding 15, R. 40, 41; Finding 17, R. 41).

Appellant asserts that inasmuch as only those members who load or discharge cargo are subject to the tonnage assessment that the assessment lacks uniformity and that under Sec. 598(10) of Title XII, Part 4, Division 1, of the California Civil Code, uniformity is required.

We will first assume with appellant that uniformity of assessment is mandatory as a basis for recovery against appellant. The statute provides that the by-laws may make provision for dues and assessments and that they—

“may be authorized to be levied upon all classes of membership alike, or in different amounts or proportions or upon a different basis upon different classes of membership and memberships of one or more classes may be made exempt from either dues or assessments, or both.”

The tonnage assessment is uniform as to all members, no distinction being made between voting and associate members. Each member loading or discharging cargo is assessed at the tonnage assessment rate measured by the tonnage of cargo.

Appellant asserts that the tonnage assessment lacks uniformity because members who do not load or discharge cargo are not required to pay for the support of appellee. This, we submit, goes not to the question of uniform application of the tonnage assessment, but

amounts only to an argument that some other method of assessment should be employed in spreading the cost of maintaining appellee. As long as the method of assessment, whatever it may be, is of uniform application it cannot successfully be attacked by appellant as invalid merely on the argument that perhaps some other method of assessment not specified would be preferable or more appropriate. It must be assumed in the absence of evidence to the contrary that the method of assessment fixed by the by-laws and employed since the organization of appellee fairly and reasonably distributes the burden of its support.

Appellant asserts that the tonnage assessment unwarrantedly invents classification of members who load or discharge cargo and those who do not, whereas the classifications fixed by the articles are voting and associate members. The tonnage assessment does not create different classes of members; it levies a uniform charge on all members who load or discharge cargo. Appellant asserts that it would be novel for a social club to have different classes of membership but to provide for the support of the club by an assessment against members who use certain specified facilities. We do not know whether such a plan is novel or not, but it would certainly not be subject to attack as being illegal for lack of uniformity and that is the basis of the alleged illegality.

The method of assessment is clearly a matter for self-determination by appellee and as long as it is uniform in its application it is not vulnerable to attack for illegality by any member who may have a differ-

ent view as to the method which should have been but was not adopted. In this case appellant participated in and approved the adoption of the method of assessment which it now criticizes (*supra*, p. 12).

The right of appellee to levy an assessment for its support is analogous to a tax levied for the support of government. Both the taxpayer and a member of appellee while remaining in such status are bound by the sovereign power of taxation in the one case and contractual right of assessment in the other. The taxpayer by removal from the jurisdiction of the sovereign may escape taxation and the member by resignation may escape assessment.

It is believed that the uniformity of assessment asserted by appellant to be required is somewhat analogous to the uniformity required under the equal protection clause of the Fourteenth Amendment in matters of taxation.

As stated in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522:

“A tax is not an assessment of benefits. It is \* \* \* a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. \* \* \*. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that

it exists primarily to provide for the common good."

In *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 179, 180, the court said in reference to an occupation tax:

"\* \* \* the state \* \* \* may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules."

In that case an occupation tax on all persons engaged in mining or producing ore was held valid even though it did not include those engaged in mining as contractors or those who did extensive development work but removed no ore.

In *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157, 163, an attack was made upon a Minnesota tax imposing upon every railroad owning lines in the state a percentage tax on gross earnings derived from operations within the state. The railroad attacking the tax received items of gross earnings subject to taxation resulting from credit balances representing payments received for the use of its freight cars from other railroads which operated in the state. It was contended that the formula used for determining the tax worked unequally and that because of having a nominal trackage in the state it was penalized as against railroads with no trackage in the state, but having like revenues from rentals of cars used in the state. In respect to these contentions the court said:

"\* \* \*. Appellant is not singled out for special

treatment. It is not taxed on one formula; the others, on another. They are all taxed pursuant to the same formula \* \* \*.

“\* \* \*. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state \* \* \*. The fact that that entails burdens is part of the price for enjoyment of the privileges which Minnesota extends.”

In *Colgate v. Harvey*, 296 U.S. 404, the general law on this subject is stated:

“\* \* \* absolute equality in taxation cannot be obtained and is not required under the Fourteenth Amendment. \* \* \*. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. \* \* \*. (p. 422)

“\* \* \*.

“The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. ‘And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification are not sufficient to defeat the law.’ \* \* \*. ‘The operation of a general rule will seldom be the same for everyone. If the accidents of trade lead to inequality or hardship, the consequences must be

accepted as inherent in government by law instead of government by edict'." (p. 436)

In the dissenting opinion the following statement of the general law is of interest:

"All taxes must of necessity be levied by general rules capable of practical administration. In drawing the line between the taxed and the untaxed the equal protection clause does not command the impossible or the impractical. Unless the line which the state draws is so wide of the mark as palpably to have no reasonable relation to the legitimate end, it is not for the judicial power to reject it and say that another must be substituted." (p. 442)

So here any assessment levied by appellee must be capable of practical administration. The tonnage assessment falls with equal burden on all members. An assessment on a tonnage basis has both the virtue of uniformity in application and ease of practical administration. Such an assessment places the burden at the point where it belongs, namely, when the cargo is loaded or when it is discharged, and only once. Simplicity of assessment was one of the fundamental reasons for adopting the tonnage assessment method. That method advises all shippers to or from ports on the Pacific Coast with certainty of the costs involved, which is of a uniform amount and uniform as to all cargo. This is of no small consequence in the practical administration of the assessment and was one of the material factors resulting in this choice of assessment on members (R. 363, 364).

We have so far assumed with appellant, contrary to the applicable law, that uniformity of assessment

is essential to establish appellant's liability for the tonnage assessment. Appellant cites *Alfalfa Growers of California v. Icardo* (Cal.) 256 Pac. 287, a decision of the district court of appeals involving a non-profit cooperative association organized under the then provisions of Secs. 653m to 653sc of the California Civil Code, subsequently repealed by Stats. 1931, p. 1839. Appellant quotes (Br. 34) from the decision in that case to the effect that assessments by corporations which have no capital stock must be equal and uniform even when the power is claimed to exist by contract. The quoted language is mere dictum as the court held that the cooperative in question was without authority to levy the assessments in view of the fact that there were no provisions therefor in the sections of the Civil Code under which it was organized or in the then applicable provisions of the Civil Code, Sec. 331, pertaining to general corporations, which has since been amended to provide for such assessments. The concurring member of the court did not join in approving the dictum to the effect that lack of uniformity would destroy the contractual obligation of the member. The statute under which appellee is organized and the amendment to the Civil Code, Sec. 331, not only expressly provides for assessment, but permits of different treatment of different classes of members. No other authority can be found which is in accord with the dictum in this case. The case cites no authority for the dictum and the case itself has never been cited by any other court. In any event, a consideration of the facts in that case on which the court concluded that there was

an unjust discrimination between members, will disclose that the same has no application to the facts here and apparently appellant does not contend to the contrary, as it makes no attempt to show any similarity.

Appellant is not in a position to and is estopped from raising any question of lack of uniformity. It is bound by contract to pay the assessment, whether it lacks uniformity or not.

It is well settled that the relation of members to each other and to an organization such as appellee is contractual and the articles of association or incorporation or by-laws constitute the terms of their agreement. This appellant apparently concedes (Br. 41).

In *Child v. Idaho Hewer Mines*, 155 Wash. 280, 284 Pac. 80, 84, the articles and by-laws of a corporation provided for the right to levy an assessment and the court stated:

“The authorities all hold that provisions such as these incorporated in the articles of incorporation and by-laws of a company have the force and effect of a contract between the stockholder and the corporation.”

See:

*Omaha Law Library Ass'n. v. Connell*, 55 Neb. 396, 75 N.W. 837;

*Blue Mountain Forest Ass'n. v. Borrowe*, 71 N.H. 69, 51 Atl. 670, 672, 673;

*Swanger v. Porter*, 87 Neb. 764, 128 N.W. 516, 519;

*Rogers v. Boston Club*, 205 Mass. 261, 91 N.E. 321, 323;

*Boston Club v. Potter*, 212 Mass. 23, 98 N. E. 614, 615;

*Big Creek Ditch Co. v. Hulick*, 130 Ore. 401, 280 Pac. 492, 494;

*Harris v. Northern Blue Grass Land Co.*, 185 Fed. 192, 194 (C.C. Wis.);

6 A Cal. Jur. §542.

It is likewise well settled that as long as one remains a member of an organization such as appellee, the contractual relationship created by the articles or by-laws remains in effect.

In *Anderson v. Amidon*, 114 Minn. 202, 130 N.W. 1002, 1004, the association was formed for social and literary purposes and to promote the commercial interests of a village, and the articles provided for annual dues. The court held:

“\* \* \* the relation of the members to each other and to the organization is contractual, and the articles of association or by-laws constitute the terms of their agreement.

“\* \* \*. \* \* \* when a person becomes a member, and subscribes to the rules and by-laws imposing the same, he thereby becomes legally liable to pay and discharge his obligations in this respect, so long as the association remains a going concern and he remains a member. \* \* \*. The law in such case will imply a promise to pay, and the consideration necessary to support the same is found in the united undertaking and the mutual promises of the several members to the same effect.”

See:

*Annandale Golf Club v. Smith*, 110 Cal. A. 765, 289 Pac. 806.

It is apparent from the foregoing authorities that appellant is contractually obligated to pay the tonnage assessment, irrespective of any argument presented as to its alleged lack of uniformity. By becoming a member it contracted to do so and it is liable on its contract.

It is recognized by appellant and found by the trial court that it has always recognized its obligation to pay the tonnage assessment on cargo which it loaded or discharged for non-members and has continued to pay this obligation on all such cargo other than Army cargo, the last such payment on cargo loaded or discharged for the War Shipping Administration being made after the commencement of this action (Finding 14, R. 40).

It is scarcely compatible with this conduct for appellant at this late date to assert that it should be permitted to remain a member, as it elected to do, but should now be relieved of the obligation to pay for services which it received, which, as the trial court has found, would have had to be performed by appellant if not furnish by appellee and at a cost exceeding the tonnage assessment which appellee seeks to recover. Inasmuch as appellant is in fact being called upon only to pay the reasonable value of services furnished to it, it would be unconscionable to permit it to escape its obligation on the basis of an argument that perhaps some other method of assessment might also have resulted in some further cost to some other member.

In *Big Creek Ditch Co. v. Hulick*, 130 Ore. 401,

280 Pac. 492, 494, a stockholder in a non-profit corporation, engaged in furnishing irrigation services to its stockholders, similarly sought, but unsuccessfully, to avoid liability for such service on the ground that the assessment levied on account thereof pursuant to the by-laws was unlawful. The court stated:

“But, even if an express contract between the corporation and the defendant had not been shown, the delivery of the water by the corporation to the defendant, his acceptance, use and application of it for beneficial purposes on his land, would raise by implication of law a promise upon his part to pay the corporation for the services performed in the delivery of the water.

\* \* \*

“\* \* \*. It was his duty, therefore, to pay the amount of the assessment \* \* \*.”

In 1943 appellant used from the hiring halls maintained at the expense of appellee approximately 42% of the total man hours employed in the Puget Sound district in loading and discharging vessels, and 15% of the total man hours employed in dock work (Ex. 41, R. 181, 398, 399, 402) and 53% of the total man hours employed in the Port of Seattle in loading and discharging vessels and 40% of the total man hours employed in both loading and discharging and dock work (Ex. 43, R. 183, 400, 401). In 1944 appellant used from the hiring halls maintained at the expense of appellee approximately 43% of the total man hours employed in the Puget Sound district in loading and discharging vessels, and 15% of the total man hours employed in dock work (Ex. 42, R. 182, 399), and 63% of the total man hours employed in the Port of

Seattle in loading and discharging vessels and 40% of the total man hours employed in both loading and discharging vessels and dock work (Ex. 44, R. 184, 401). From these percentages it is at once apparent that appellant was one of the largest users of appellee's services.

**All Members, Voting and Associate Alike, Are Subject to Liability for the Tonnage Assessment Under Appellee's By-Laws.**

Appellant specifies as error the failure of the trial court to make a conclusion of law that appellee is without power to levy and collect dues from an associate member (Br. 7, 36).

The by-laws empower the Board of Directors to levy dues and assessments in accordance with the provisions of the by-laws (Art. IV(f), R. 59) and further provide that:

“In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged \* \* \*.” (Art. XVI, R. 72)

Inasmuch as the by-laws specify the method of assessment and who is to pay it there remains only for the Board of Directors in levying the assessment to determine the amount to be paid per ton of cargo.

The by-laws state that “each member” shall pay the assessment, not that the voting members or the associate members shall pay the assessment. The expression “each member” clearly includes both voting and associate members. Appellant apparently con-

cedes as much, but asserts that "other provisions of the by-laws and the practices followed cast a very different light on the situation" (Br. 37).

Appellant points out that on dissolution the remaining assets are to be divided among the voting members only (Art. XXI, R. 77). Appellant argues that such a provision is unfavorable to associate members, but concedes that associate members could so agree (Br. 38). The provision for division of assets on dissolution has no bearing on and cannot assist in the construction of the unambiguous by-law provision imposing the tonnage assessment on all members.

Appellant points out that an initiation fee is provided for voting members, but that associate members are not required to pay an initiation fee unless otherwise directed by the Board of Directors (Art. XV, R. 71). The provision concerning initiation fees has no bearing on and cannot assist in the construction of the unambiguous by-law provision imposing the tonnage assessment on all members.

It should be noted, however, that in providing for resignation of any member it is specifically provided "that no such resignation shall become effective until full payment of all arrears for dues and assessments to which such member has become liable" (Art. XIX, R. 75). This is consistent with the imposition of the tonnage assessment on all members.

It is, of course, obvious that neither other provisions of the by-laws on other subjects nor any practices that might have been followed can be substituted for the unambiguous by-law provision imposing the tonnage assessment on all members.

Never since the inception of appellee has anyone heretofore questioned its power to levy and collect the tonnage assessment on voting and associate members alike. Appellant now asserts, contrary to the fact, that the practical construction given to the by-laws requires an interpretation that associate members are not subject to the tonnage assessment. In making this assertion appellant ignores the undisputed testimony that in adopting the tonnage assessment method in the by-laws it was intended as a charge against all members loading or discharging vessels and was not limited to voting members and applied to all types of members, steamship companies, terminal operators and stevedores (R. 377), and that all types of members have paid the tonnage assessment from the beginning (Finding 19, R. 41, 378). Appellant's assertion ignores the undisputed testimony and the findings of the trial court:

"From the organization of plaintiff its members have loaded cargo upon or discharged from vessels for various agencies of the government, including the Army and the Navy and the member so loading or discharging this cargo has reported the tonnage and paid the tonnage assessment thereon. In 1940 defendant commenced to load and discharge cargo for the Army and reported the tonnage and paid the tonnage assessment thereon without questioning its obligation so to do. \* \* \*." (Finding 10, R. 38, 39)

"The defendant has at all times recognized and never questioned its obligation to report the tonnage of cargo loaded upon or discharged from vessels by it for the United States acting through the agency of the War Shipping Administration

and has paid the tonnage assessments thereon to plaintiff, the last payment thereon being (first) made after the commencement of this action.” (Finding 14, R. 40)

“All members of the plaintiff and of the Port Associations which are members of plaintiff, have paid all the tonnage assessments on all cargo loaded on or discharged from vessels by them, including cargo loaded or discharged for government agencies, including the Army, with the exception of defendant and two much smaller delinquents in smaller out ports.” (Finding 19, R. 41, 42)

Such payments by appellant and other associate members is scarcely compatible with the assertion that the practical construction has been that associate members are not subject to the tonnage assessment.

Appellant asserts that prior to 1940 the resolutions of the Board of Directors simply levied the tonnage assessment “without stating what class of member is liable” (Br. 38). As has been heretofore pointed out, the by-laws specify the method of assessment and who is to pay it, there remaining only for the Board of Directors in levying the assessment to determine the amount to be paid per ton of cargo. This was the method pursued by the Board of Directors (Ex. 3A, R. 95; Ex. 5, R. 96; Ex. 7, R. 99).

Appellant again refers to the agreement initiated by the stevedores whereby they obligated themselves to collect the tonnage assessment from non-member steamship companies (Ex. 10, R. 105) and inquires as to why this was necessary if they were already ob-

ligated to pay the tonnage assessment (Br. 39). This agreement was the result of the original recommendation of stevedores made on February 15, 1940 (Ex. D, R. 197) and adopted by the Board of Directors (Ex. E, R. 199) that "contracting stevedores and steamship lines," namely both voting and associate members, should either collect the tonnage assessment from non-members for whom stevedoring operations were performed or a man-hour charge subject to agreement being reached with the Union. This procedure was never put into effect and was subsequently rescinded (Ex. 9, R. 101, 556, 557, 558). It appears from the testimony that the stevedores wanted to be certain that when they were engaged in loading or discharging cargo for non-members, that their tonnage assessment obligation would be assumed by the non-member in the stevedore contract "largely as a matter of being certain that there would not be unfair competition between stevedores in manipulating cargo handling rates" (R. 378).

On May 8, 1940 (Ex. 8, R. 100, 267, 268) the Board of Directors appointed a committee, including stevedores, to further deal with this subject and adopted a resolution (Ex. 9, R. 101, 268) providing that the final report of this committee would stand approved when consented to by the stevedore members. The final report of the committee was the agreement to which appellant refers as the "special 'collect and remit' agreement of May 9, 1940" (Br. 39, Ex. 10, R. 105) and which rescinded the action taken on February 15, 1940, on the same subject. This agreement was subsequently signed by all stevedores, including

appellant (R. 107, 506, 507). It provides that the stevedores shall collect the tonnage assessment from non-members and remit to appellee and further provides for the insertion of a clause in the stevedoring contract with non-members whereby the non-member "agrees to reimburse the stevedore" for the tonnage assessment. It further provides that appellee "will consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written statement of the facts that they have tried but failed to collect under the foregoing contract provisions." Where a member stevedore loads or discharges cargo for a member steamship company, arrangements were and are still common between them whereby one or the other reports and pays the tonnage assessment (R. 379, 380, 430-433, 500, 555, 556). In view of the fact that the member steamship company ultimately bears the cost of the tonnage assessment, the agreement further provides for this situation by relieving the stevedores of responsibility in such instances (R. 379). This agreement is not the basis of, but is a recognition of, the liability of associate member stevedores for the tonnage assessment. The basis of that liability for both voting and associate members is the by-law provision providing for the tonnage assessment. This is a special agreement among stevedore members only for the primary purpose of meeting their wishes in connection with an attempt to establish a uniform practice among them when loading or discharging cargo for non-members.

As late as May 26, 1943, appellant as a party to a report (Ex. 32, R. 134) adopted by the Board of

Directors (Ex. 33, R. 139) agreed that "all members \* \* \* will continue to be directly responsible for the tonnage assessment \* \* \*" (*infra* p. 64).

There is nothing in the by-laws nor in their practical interpretation which modifies in the slightest degree the unambiguous by-law provision imposing the tonnage assessment on all members.

Even if the by-laws of appellee did not contain the provision for the assessment to be levied against members, the power to make such assessment would nevertheless exist under the general powers granted to appellee in its articles and by-laws. It is provided in the articles that appellee has power:

"To do all other acts necessary or expedient for the administration of the affairs of the corporation and/or the attainment of any of the objects or purposes hereinbefore specified." (Art. II, 9(f), R. 53)

It is provided in the by-laws that the Board of Directors is empowered:

"To conduct, manage, and control the affairs and business of the corporation, and to make such regulations therefor, not inconsistent with law and these by-laws, as they may deem best." (Art. IV(b), R. 58)

There necessarily follows the power to raise funds for its support and the corresponding obligation on members to comply with action taken to that end as long as they remain members.

In *Omaha Law Library Ass'n. v. Connell*, 55 Neb. 396, 75 N.W. 837, 838, the liability of a member of a non-profit stock company for payment of dues was

upheld, although no provision of the statute under which it was incorporated, nor its articles provided for the payment of dues. The court holding that there was implied authority therefor, stated:

“\* \* \*. \* \* \* it is organized for the purpose of establishing and maintaining a law library for the use of its stockholders. It must have been apparent \* \* \* that after it was organized certain current expenses would have to be met. \* \* \* we think the promoters of this corporation by its articles of association, authorized its board of directors to enact just such a by-law as the one in controversy, namely, one to meet the current expenses of maintaining the library. The by-law, then, is not inconsistent with the law authorizing the creation of the corporation, nor is it inconsistent with the corporation charter.”

“\* \* \*. The by-law imposes the annual dues upon the stockholder, and so long as he is a stockholder he is liable for the dues, whether he uses the library or not.”

**The Resolutions of Appellee's Board of Directors Levying the Tonnage Assessment Are Not Invalid Because Not Authorized by Vote of the Membership.**

Appellant specifies as error that the trial court erred in finding that appellee levied the tonnage assessment pursuant to the by-laws and in not finding to the contrary (Br. 7, 42).

The trial court found:

“Pursuant to the By-Laws of the plaintiff its Board of Directors duly levied and assessed against the member(s) of the plaintiff a tonnage assessment which is now and at all times since

before 1940 has been in full force and effect, to-wit: 2½ cents per manifest ton, on all off-shore and intercoastal cargo handled by members loaded upon or discharged from vessels, including such cargo handled for non-members, payable at the end of each month.” (Finding 7, R. 38)

Appellant’s argument, unsupported by the citation of any authority, is that the power granted to the Board of Directors to levy assessments is rendered ineffective by the limitation that it “shall not have the power to levy \* \* \* or collect \* \* \* assessments in excess of the maximum rate to be fixed” by vote of the membership (Art. IV(f), R. 59).

It is not contended that the tonnage assessment rate is in excess of a maximum rate so fixed, but it is merely contended that no maximum rate has been fixed. Under these circumstances it appears obvious that the rate fixed by the Board of Directors for the tonnage assessment is not in violation of any restriction imposed by the membership. If the contention here presented is available, it is without merit.

The present rate was first established by a resolution of May 11, 1938 (Ex. 5, R. 96), which appellant admitted was duly adopted (R. 260, 261) and of which appellant received notice on or about May 20, 1938 (Ex. 6, R. 98, 264, 265). In view of the fact that the resolution was admittedly duly adopted and in view of the fact that no foundation was laid in the pleadings for the defense now presented, appellee objected to any testimony on the issue (R. 540). By way of offer of proof only (R. 548) it appears that the original rate was ratified by the membership, both

voting and associate (R. 549), but that no similar action by the membership was subsequently taken in connection with the increase (R. 550). The resolution of February 14, 1940 (Ex. 7, R. 99) recites that the resolution of July 31, 1937, was confirmed in writing by the membership.

In addition, it is to be remembered that the increased rate has been in effect since 1938 and has been and is being paid by all members, including appellant. No member, including appellant, may at this late date successfully attack the rate of assessment. The continued acquiescence therein clearly creates an estoppel to raise the point now presented by the defendant as an after-thought. *Gowans v. Rockport Irr. Co.*, 77 Utah 198, 293 Pac. 4, 7.

**Appellee Has Levied the Tonnage Assessment Against All Members, Voting and Associate, Including Appellant.**

Appellant specifies as error the failure of the trial court to find that no resolution levying the tonnage assessment has ever been adopted applicable to an associate member (Br. 7, 43).

Appellant's contention is that the resolutions of the Board of Directors do not contain a direct levy on appellant or any other associate members, but seek to accomplish this result as to associate members by referring back to the special agreement of May 9, 1940 (Ex. 10, R. 105), which appellant asserts cannot be applied to Army cargo.

At the expense of repetition it is again pointed out

that the by-laws provide the method of assessment and who is to pay it. The Board of Directors in levying the assessment is to determine the amount or rate to be paid per ton of cargo. In accordance with this provision of the by-laws by resolution of July 31, 1937 (Ex. 3A, R. 95, 529, 530) the Board of Directors levied the tonnage assessment and fixed the rate thereof which, as the by-laws provide, is payable "by each member." The consistent practice under this provision of the by-laws has been for both voting and associate members, including appellant, to pay the tonnage assessment (R. 377-381, 430-433, 436, 473, 478-481, 487-500, 518, 555, 556, 585, 587; Ex. 45, R. 509-512).

The resolution of May 11, 1938 (Ex. 5, R. 97) merely increases the rate for the tonnage assessment provided in the by-laws and provides for notice "to members of the increase in assessment rates," which appellant received on or about May 20, 1938 (Ex. 6, R. 98, 264, 265). The resolution of February 14, 1940 (Ex. 7, R. 99) reaffirms the increase. The resolution of February 15, 1940 (Exs. D, E, R. 197-199) requires no further comment, as heretofore pointed out it was rescinded and never acted upon (R. 557, 558). The resolution of May 8, 1940, and attached agreement of May 9, 1940 (Ex. 9, R. 101; Ex. 10, R. 105) has heretofore been discussed.

Appellant fails to refer to the resolution of August 14, 1940 (Ex. 12, R. 108) which of course is accounted for by the fact that it does not conform to appellant's present argument. By this resolution "acceptance of responsibility for non-member tonnage assess-

ments" was made a condition of membership for all contracting stevedores and notice of this action (Ex. 13, R. 109) was received by appellant on or about August 17, 1940 (R. 273, 274). It is, of course, obvious that the Army is a non-member and that appellant clearly understood and assumed its obligation to pay the tonnage assessment on cargo loaded or discharged for the Army (R. 600, 601).

If there could have been any doubt, this would have been removed by the resolution of March 12, 1941 (Ex. 14, R. 110, 274, 286, 287) wherein it is specifically stated that the obligation applies to cargo loaded or discharged for the Army. The obvious purpose of this resolution was to reaffirm the understanding always theretofore in effect that Army cargo was non-member tonnage (R. 500). Appellant commenced loading and discharging Army cargo in 1940 and had been reporting and paying the tonnage assessment thereon without question (Ex. 20, R. 121, 283, 510, 511, 512; Ex. 45, R. 509). This was followed by a similar resolution of April 16, 1942 (Ex. 15, R. 111, 275) requesting regular reporting on Army cargo by all members, including stevedores, of which resolution appellant received notice on or about April 27, 1942 (Ex. 16, R. 112, 276). Finally, on June 25, 1942, a resolution was adopted:

"\* \* \* that the contracting stevedores or the steamship companies doing stevedoring of cargo for either the Army, Navy or W S A is obligated to report the tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the Association; and

“\* \* \* the Board reaffirms the base rate of assessment as 2½c per ton now in force on commercial cargo.” (Ex. 17, R. 115, 279)

of which appellant received notice on or about July 1, 1942 (Ex. 18, R. 116, 280). Non-member tonnage was reported on the regular reporting form (Ex. 4, R. 508).

It is difficult in view of the foregoing to see how appellant seeks to successfully maintain its position that no resolution levying the tonnage assessment against any associate member has ever been adopted.

### **The Tonnage Assessment Is Not Based Upon Threatened Duress and Therefore Invalid.**

Appellant specifies as error the failure of the trial court to find that the tonnage assessment is unenforceable because based on duress consisting of threats of economic reprisals (Br. 7, 45).

Appellant concedes that it could have resigned and therefore have avoided the tonnage assessment (Br. 45), but asserts that it was not required to do so to remain free of payment because, first, it could remain a member and insist upon appellee adopting a lawful dues program and policy, and second, as a non-member the cost to it of securing longshoremen from the jointly maintained hiring halls would exceed the tonnage assessment.

The first contention is obviously unsound, as by continued membership appellant remains contractually obligated for the tonnage assessment (*supra* p. 42).

The second contention is equally without merit. As

heretofore explained, the hiring halls from which longshoremen are obtained by appellant and other members of appellee are maintained at the joint expense of appellee and the Union. Non-members of appellee are assessed a charge for obtaining men from the hiring halls as an equitable reimbursement to appellee of its portion of the cost of maintaining the hiring halls (R. 360). This charge is on a man-hour basis and was originally 2½c (Ex. 3A, R. 95) and was raised to 4c at the request of stevedore members (Ex. 11, R. 108, 272, 360, 426). Such a charge was in effect in the Washington Association before the hiring halls were taken over by appellee (R. 360, 361). Inasmuch as one of appellant's contentions is that the support of appellee should not be limited to the tonnage assessment, it seems rather inconsistent to also contend that non-members securing longshoremen from the hiring halls should not be required to equitably reimburse appellee for its costs in maintaining the hiring halls.

The proposal of the stevedore members, adopted by the Board of Directors on February 15, 1940 (Exs. D, E, R. 197, 199) that agreement be reached with the Union that men should not be furnished from the hiring halls to non-members who refused to pay the non-member assessment was, as previously indicated, subsequently rescinded and never put into effect.

Appellant asserts that there are threats of economic compulsion contained or inherent in certain action taken by appellee in connection with appellant's delinquency by a resolution of February 25, 1943 (Ex. 23, R. 125). By this resolution it was recited that

appellant had refused to pay the tonnage assessment and that suit would be instituted after first giving appellant advance notice. It was further provided that a committee representing appellee should meet with the Washington Association and enlist its support in an effort to resolve this situation and to meet with appellant to effect a method of payment, with authority to agree to any reasonable basis of deferred payments. The concluding portion of the resolution, to which appellant refers, provides that San Francisco members having agents in Seattle should advise them and instruct those who are members of the Board of Trustees of the Washington Association to vote to support the action of appellee. ,

It is apparently appellant's contention that because appellee thus sought the aid and assistance of the Washington Association in resolving the situation brought about by appellant's failure to pay the tonnage assessment, therefore appellant should be relieved of the tonnage assessment. The Washington Association is an associate member of appellee and appellant is both a member of appellee and of the Washington Association. No authorities are submitted in support of this rather remarkable contention and it is obviously without merit.

Appellant as a non-member cannot properly expect to use the facilities of the joint hiring halls in securing longshoremen without payment of an equitable charge for that service. It is not contended that the man-hour charge is inequitable or excessive. Appellant contends first, that as a member it is not obligated to pay the tonnage assessment for appellee's

support, and second, that as a non-member it should not be obligated to pay the man-hour charge. Taken together, the position is that the industry represented by appellee should provide all its services to appellant free of charge. It is, of course, obvious that this fails to make sense, for if appellant is so entitled so are all members, and non-members, in which event appellee would cease to exist.

There is no merit in nor evidence in support of the contention that the tonnage assessment is based on duress consisting of threats of economic reprisals.

•

**Appellant In Addition to Its Contractual Obligation Under the By-Laws, Further Agreed In Writing on March 11, 1943, to Pay the Tonnage Assessment.**

Appellant specifies as error the failure of the trial court to find that appellant at no time contracted to pay the tonnage assessment on Army cargo (Br. 7, 48).

The trial court found:

“On March 11, 1943, the plaintiff accepted from the defendant a letter signed on its behalf by its secretary-treasurer, director and attorney, reading as follows:

“‘This is to advise you that on the tonnage handled by us for the U. S. Army up until January 31, 1943, upon which no tonnage assessment has been paid, we will pay the Waterfront Employers Association of the Pacific Coast the tonnage assessment of 2½c per ton on a volume tonnage to be determined; payment to be made in approximately equal installments of thirty, sixty and ninety days from this date.

“‘Also from February 1, 1943 onward, we will pay the tonnage assessments currently at the rate set by the Coast Association.’” (Finding 12, R. 39, 40)

“Following the delivery of said letter on March 11, 1943, defendants paid to plaintiff in installments the tonnage assessments due for the period ending December 31, 1942, on cargo so loaded or discharged by it for the Army, the last payment being made on November 23, 1943.” (Finding 13, R. 40)

Appellant specifies no error in the making of these findings.

In addition to appellant's contractual obligations as fixed by the articles and by-laws, recognized by the special agreement among stevedore members (Ex. 10, R. 105), and affirmed by its continued membership, appellant by this letter accepted by appellee on March 11, 1943, has expressly promised to pay specifically and in detail the very tonnage assessment for which this action is being brought.

Appellant on its own admission recognizes a “moral obligation” for payment of the tonnage assessment (Br. 49). By this promise appellant agreed to pay the tonnage assessment on cargo handled by it for the Army up until January 31, 1943, in installments, and thereafter currently at the rate set by appellee. Appellant has met this promise to the extent of the tonnage assessment due for the period up to and including December 31, 1942, but has failed to keep its promise to pay the tonnage assessment thereafter.

A moral obligation is sufficient under such circum-

stances to support a subsequent promise to pay. *Irons Investment Co. v. Richards*, 184 Wash. 118, 50 P. (2d) 42, 44; *Opitz v. Hayden*, 17 Wn.(2d) 347, 135 P.(2d) 819, 827. It is clear from the statement of the law in the latter case that a moral obligation, accompanied by material benefits to the promissor will support a promise to pay. Such is the situation in reference to appellant's promise and its liability for the tonnage assessment may be predicated solely thereon. The court in the latter case refers to 17 A.L.R. 1229, 1366, wherein it is stated:

“\* \* \* the moral obligation arising from a benefit of a material or pecuniary kind conferred upon the promissor by past services, rendered in the expectation that they were to be paid for—or, at least, if rendered upon the assumption by the person rendering them, though mistaken, that they would create a real liability—and, otherwise, in circumstances creating a moral obligation on the part of the promissor to pay for the same, will support an executory promise to do so, although there was, previous to such promise, no legal liability or promise, perfect or imperfect.”

If appellant was not at the time of the making of the promise, nor subsequently, otherwise legally bound to pay the tonnage assessment, it is bound on its promise based on a moral obligation accompanied by material benefits. The promise is further supported by a further ratification (Exs. 32, 33; R. 134, 139) and by continuous consideration moving to appellant from appellee in view of appellant's election to continue as a member and to accept the continued benefits of such membership. The promise is further supported by the

consideration resulting from appellee accepting such promise and not expelling appellant, which right appellee had at the time the promise was made.

The circumstances surrounding the making of this promise are as follows: Due to the failure of appellant to pay the tonnage assessment it was notified that a meeting of the Board of Directors would be held on November 11, 1942 (Ex. 19, R. 118). In response to this notification appellant did not state that it did not consider itself liable for the tonnage assessment which it had not paid, but merely stated that "this charge has been held in abeyance" (Ex. 20, R. 121). As a result of this meeting the Board of Directors ordered that all delinquencies covering tonnage assessments, including for Army cargo, be paid up to date and that a committee be appointed to consider whether there should be a change in the assessment program (Ex. 21, R. 122). The committee was appointed and by its report, which was approved by the Board of Directors on November 12, 1942 (Ex. 22, R. 123) it was provided that the tonnage assessment remain for payment by the member loading or discharging the cargo and that members desiring a change in the assessment policy should forward their recommendations to the Board of Directors.

On November 24, 1942, the Washington Association recommended to the stevedores in the Washington district that they work out a proposal for a change in the assessment policy (Exs. M, M1, R. 215) and on December 11, 1942, a committee of stevedores, including F. E. Settersten, President of appellant, herein called the "Seattle Committee," was appointed to pre-

pare such a proposal (Ex. N, R. 217). As a result of the resolution of February 25, 1943, authorizing institution of suit against appellant (Ex. 23, R. 125) a committee, herein called "Appellee's Committee," met with the Washington Association and appellant on March 10, 1943 (Ex. 24, R. 128, 287) resulting in an oral promise of appellant to pay the tonnage assessment (R. 288) followed by the written promise, accepted by appellee on March 11, 1943 (Ex. 25, R. 132).

Appellant has printed in the record letters (Exs. G, H, I, J, K, R. 201-212) which were not admitted in evidence, subsequently passing between Appellee's Committee and the Seattle Committee, which contained a variety of proposals for changes in the assessment policy. Finally on May 26, 1943, these committees met (M. J. Weber, Vice President of appellant substituting for F. E. Settersten, its President, on the Seattle Committee) at which meeting a joint proposal in the form of a report (Ex. 32, R. 134, 366, 367) was prepared and subsequently submitted to and adopted by the Board of Directors on May 27, 1943 (Ex. 33, R. 139). In this report, adopted with the approval of said M. J. Weber, representing appellant (R. 367, 461, 475) the first item of agreement was as follows:

"All members of the Coast Association who are employers of longshore labor will continue to be directly responsible for the tonnage assessment as set by the Coast Association." (Ex. 32, R. 134, 137)

This was a clear recognition by appellant of its obli-

gation to pay the tonnage assessment and a reaffirmation of its promise to pay the same.

The report further contained a proposal for further consideration of changes in the assessment program of appellee concerning which no conclusions were ever thereafter reached (R. 369, 375, 376, 615).

Appellant asserts that "it is unthinkable" that appellant would agree that its liability for the tonnage assessment would rest on a special contract while other members would be liable under the by-laws only (Br. 49). Of course the liability of all members results from the by-laws providing for the tonnage assessment and appellant's special agreement of March 11, 1943 (Ex. 25, R. 132) is but a further and independent contract to the same effect. This independent contract, even if it exceeded the contractual obligation of the by-laws would nevertheless be enforceable.

In *Ford v. Peninsula Light Co.*, 164 Wash. 599, 4 P.(2d) 504, 505, 506, a non-profit corporation organized to transmit electrical energy to its members, had a by-law provision providing for reimbursement of members for the cost of transmission lines built by them. The plaintiff member as a condition of membership waived the benefit of this provision and in seeking such reimbursement relied on the by-law provision. The court recognized the rule "that the by-laws constitute a contract between the stockholder and the corporation," but held:

"The price to appellant of membership \* \* \* was a specific oral agreement at variance with the provisions of the by-laws \* \* \*. It was not

an illegal condition precedent to membership on the part of respondent, and appellant is bound by his acceptance."

### CONCLUSION

It is undisputed that appellant along with others engaged in the shipping industry, requiring coordinated effort in dealing with labor problems, including the establishing, maintaining and administration of hiring halls, organized appellee for that purpose. Appellant has been one of the most substantial beneficiaries of this coordinated effort.

It is further undisputed that the tonnage assessment used for appellee's support is a just and reasonable amount and commensurate with the value of its services to appellant. It is further undisputed that these services were needed by appellant to perform its contracts with the Army and if not furnished by appellee the appellant "would have needed to have furnished them itself at a much greater cost \* \* \* than the assessments levied and charged \* \* \*" (Finding 15, R. 40).

Appellant's position, aside from criticism of the by-laws, the adoption of which it approved, is that as a member it is entitled to receive and benefit by the services of appellee at the expense of its fellow members. There is no justification in morals for such a position and appellant's alleged legal defenses in support of such a position are without merit.

It is submitted that none of the errors specified by

appellant are well taken, that the trial court's findings and conclusions are in all respects without error, and that the judgment appealed from should be affirmed.

Respectfully submitted,

EDWARD G. DOBRIN,  
STANLEY B. LONG, of  
BOGLE, BOGLE & GATES,  
603 Central Building,  
Seattle 4, Washington.

*Attorneys for Appellee.*

